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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

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QUESTION PRESENTED

Whether the legislative veto provision in subsection (f)(3) of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1552(f)(3), is severable from the remainder of Section 43, which establishes reemployment protection for certain employees of air carriers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 766 F.2d 1550, and the opinion of the district court (Pet. App. 30a-37a) is reported at 594 F. Supp. 92.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1985, and the petition for rehearing was denied on September 11, 1985. The petition for a writ of certiorari was filed on November 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, Congress passed the Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, in order to free significant aspects of the airline industry from federal regulation. Because of concern that this legislation might have a major impact on airline employees, Congress included in Section 43 of the Deregulation Act (49 U.S.C. App. 1552) several employee protection provisions. Section

43(d) (49 U.S.C. App. 1552(d)) provides that a protected employee of a federally regulated air carrier who is furloughed or otherwise terminated by the carrier (other than for cause) during the 10-year period following the date of enactment of the Deregulation Act (October 24, 1978) shall have a first right of hire with any other carrier that held a certificate under 49 U.S.C. App. 1371 on October 24, 1978.[1] Each such air carrier has a corresponding duty to hire a terminated protected employee, except that the carrier may recall any of its own employees who had been furloughed before hiring a protected employee who had been laid off by another carrier. In addition, subsections (b) and (e) provide—subject to the amount of funds actually made available under appropriation acts—for the payment of monthly benefits to protected employees who have been deprived of employment. 49 U.S.C. App. 1552(b) and (e). However, Congress has not appropriated any funds to implement the latter provision.

Subsection (f)(1) of Section 43 (49 U.S.C. App. 1552(f)(1)) provides that the Secretary "may issue, amend, and repeal such rules and regulations as may be necessary for the administration of [Section 43]." Paragraph (3) of subsection (f) provides that the Secretary shall not issue any rule or regulation in final form until 30 legislative days after it was submitted to the responsible committees of the House and Senate, and a final regulation in turn shall become effective 60 legislative days after it was submitted to Congress unless one House of Congress has passed a resolution of disapproval during that period. The Secretary promulgated final regulations concerning the "first right of hire" provision in

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[1]The term "protected employee" is defined by Section 43(h)(1), 49 U.S.C. App. 1552(h)(1) to mean a person who, on October 24, 1978, had been employed for at least four years by a certified carrier.

Section 43(d) in November 1983 (Pet. App. 45a-60a).[2] The regulations were scheduled to become effective 60 legislative days after they were promulgated (*id.* at 59a).

2. Shortly after the regulations were promulgated in final form, petitioners filed this action against the respondent Secretary of Labor in the United States District Court for the District of Columbia. Petitioners challenged the statute and the implementing regulations on a variety of grounds, including that the statutory subsection establishing a first right of hire was invalid because of the inclusion of a legislative veto clause in the subsection authorizing the promulgation of regulations. Several airline employee unions intervened to support the statute and implementing regulations. The Secretary conceded that the legislative veto provision in subsection (f)(3) is invalid under this Court's decision in *INS* v. *Chadha,* 462 U.S. 919 (1983), but the Secretary took the position that the veto provision is severable from the remainder of Section 43, thereby leaving the first right of hire provision intact (Pet. App. 5a).

On May 17, 1984, the date on which the regulations were to become effective, the district court held that the legislative veto provision was inseverable from the remainder of Section 43. The court therefore invalidated the airline employee protection program in its entirety and enjoined implementation of the regulations. Pet. App. 30a-37a.

3. The court of appeals reversed (Pet. App. 1a-29a). After reviewing the severability principles applied by this Court, particularly in *Chadha* itself, the court concluded that the invalid legislative veto provision must be severed " '[u]nless it is evident that the Legislature would not have

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[2]Proposed regulations had been promulgated in 1979. 44 Fed. Reg. 19146.

enacted those provisions which are within its power, independently of that which is not' " (Pet. App. 16a, quoting *Chadha,* 462 U.S. at 931-932). The court further concluded that petitioners must overcome a presumption of severability because the first right of hire provision "is fully operable as a law" without the legislative veto provision (Pet. App. 16a, quoting *Chadha,* 462 U.S. at 934). Applying these principles, the court found the veto provision to be severable. It found no indication that Congress would have declined to enact an employee protection program without the provision for a one-House veto of implementing regulations, observing that "Congress had a strong, humanitarian desire to provide for airline employee protections" and, by contrast, "expressed relatively little concern about the veto provision" (*id.* at 19a). See generally *id.* at 19a-20a.[3] The court of appeals accordingly remanded the case to the district court to consider petitioners' other challenges to the regulations, which had not been addressed by the district court (*id.* at 28a).

4. On remand, in an opinion dated January 22, 1986, the district court, with one exception, sustained the Secretary's regulations against petitioners' contentions that they were inconsistent with the statute. *Alaska Airlines, Inc.* v. *Brock*, Civ. No. 84-0485 (D.D.C.).[4] The exception concerns Section 220.21(a)(1) of the regulations (Pet. App. 52a; 48 Fed. Reg. 52863 (1983)), which relates to the initial hiring age of flight officers and pilots. The district court remanded the question of the validity of this provision to the Secretary for further consideration in light of petitioners' contention

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[3]Judge Ginsberg, concurring in the judgment, likewise concluded that "[d]eletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress," while a declaration of inseverability "would be far more destructive of the legislature's will" (*id.* at 29a).

[4]We have lodged a copy of the district court's January 22 opinion with the Clerk of this Court.

that the initial hiring age may affect the amount and adequacy of an employee's training and experience, and thereby implicate safety concerns. Slip op. 12-14. After the district court and court of appeals declined to stay the effective date of the regulations, the Chief Justice, by order dated January 27, 1986, denied petitioners' application for a stay of the regulations pending the Court's disposition of the instant certiorari petition. No. A-571.

ARGUMENT

The court of appeals, applying the severability principles of this Court's decision in *Chadha,* correctly held that the legislative veto provision in Section 43(f)(3) of the Airline Deregulation Act of 1978 (49 U.S.C. 1552(f)(3)) is severable from the remainder of Section 43. This holding does not conflict with any decision of this Court or another court of appeals, and it presents no issue of general importance warranting review by this Court.[5]

1. a. In *Chadha,* the Court held that an unconstitutional legislative veto provision is to be severed from the remainder of the statute " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' "

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[5]Petitioners' suggestion (Pet. 7-8 n.5) that the court of appeals did not have jurisdiction of respondents' appeals under 28 U.S.C. 1291 is refuted by this Court's jurisdictional ruling in *EEOC* v. *Allstate Insurance Co.,* No. 83-1021 (June 11, 1984). There, the EEOC took a protective direct appeal to this Court pursuant to 28 U.S.C. 1252 from the district court's holding that the legislative veto provision in the Reorganization Act of 1977 was inseverable from the remainder of the Act. However, the EEOC argued that an appeal from such a holding of nonseverability, which presents a question of legislative intent rather than constitutional law, must be taken to a court of appeals pursuant to 28 U.S.C. 1291. See *Heckler* v. *Edwards,* 465 U.S. 870 (1984). The Court thereafter dismissed the appeal in *Allstate,* thereby making clear that an appeal in a case such as this must be taken to the court of appeals under 28 U.S.C. 1291, not to this Court under 28 U.S.C. 1252.

462 U.S. at 931-932, quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). The Court further reiterated the established principle that an unconstitutional statutory provision is "presumed severable if what remains after severance 'is fully operable as a law.' " 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234. The court of appeals adhered to those principles in this case. See Pet. App. 15a-19a.

The court of appeals correctly held (Pet. App. 19a), and petitioners do not dispute, that the first right of hire provision is fully operable as a law if the legislative veto provision is severed. Indeed, contrary to petitioners' apparent assumption, a carrier's obligation to hire protected employees who are furloughed or terminated by another carrier is not dependent upon the issuance of any regulations by the Secretary. The statute itself imposes that obligation. Section 43(d) states, without any reference to implementing regulations, that "[e]ach such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person." 49 U.S.C. App. 1552(d). Because the legislative veto provision applies only to regulations, not to the substantive obligation of the carriers under Section 43(d), it is particularly clear that Section 43 is fully operable as a law without the veto provision.

Similarly, the separate subsection (f), which addresses the issuance of regulations, simply states that "[t]he Secretary *may* issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section." § 43(f)(1), 49 U.S.C. App. 1552(f)(1) (emphasis added). This language would not appear to impose on the Secretary a mandatory duty to issue regulations that, if issued, would be subject to a legislative veto. Nor does Section 43(f)(1) make the effectiveness of the substantive first right of hire

under Section 43(d) contingent upon the issuance of such regulations.[6] Instead, the regulations to which it refers are those necessary for the "administration" of Section 43(d) and the other substantive provisions elsewhere in Section 43. Thus, the text of the Act refutes petitioners' contention that the provision in subsection (f) for a one-house legislative veto of regulations was deemed by Congress to be so central that it is inseverable from Section 43(d), which imposes the hiring obligation on petitioners. *A fortiori*, it is not "evident" that Congress would have refused to enact the valid substantive provisions of Section 43 independently of the legislative veto provision. *Chadha*, 462 U.S. at 931-932.

b. This conclusion is strongly reinforced by the legislative history of Section 43. The employee protection provision is "an integral part of a comprehensive deregulatory regime" (Pet. App. 23a). As the court of appeals concluded after reviewing the legislative history (*id.* at 28a):

> Ample evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

Petitioners devote virtually no attention to this holding or to the court of appeals' careful analysis of the legislative

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[6]By contrast, Congress expressly made the effectiveness of the other employee protection provision in Section 43—the availability of monthly assistance payments and relocation assistance—contingent upon further action by Congress. It provided that entitlement to such payments was to be "subject to such amounts as are provided in appropriation Acts" (§ 43(a), (b) and (c), 49 U.S.C. App. 1552(a), (b) and (c)). The omission of any comparable condition in Section 43(d) reinforces the conclusion that Congress intended it to have independent effect, irrespective of the existence of implementing regulations or the authorization of a legislative veto of such regulations.

history, and they fail to raise any serious doubt about the soundness of the court's conclusions. See Pet. 20-22.

As the court of appeals correctly observed (Pet. App. 20a-21a), both the House and Senate versions of the proposed deregulation legislation contained airline employee protection provisions, and each body deemed such protections important. See S. Rep. 95-631, 95th Cong., 2d Sess. 113-114 (1978); H.R. Rep. 95-211, 95th Cong., 2d Sess. 26 (1978). Moreover, the version of the employee protection plan adopted by the Conference Committee was essentially similar to that proposed by the Senate, which was regarded as the weaker of the two plans. See Pet. App. 21a n.10. Thus, the legislative veto provision was not inserted at the insistence of one House as a condition to its agreement to a stronger protection program proposed by the other House. See Pet. App. 20a-21a, 26a-28a.

As the court further observed, various comments in the legislative history that an employee protection program might prove to be unnecessary apparently were premised on the view that *overall* employment in the airline industry might not be adversely affected by deregulation, and that for this reason the federally funded unemployment benefits under Section 43(a), (b) and (c) might be unnecessary; those comments did not address the question of adverse impacts on particular carriers, to which the first right of hire provision was addressed. See Pet. App. 22a-23a.

Petitioners also rely (Pet. 3-4, 21-22 & n.14) on the fact that the Conference Committee inserted the requirement in Section 43(f)(3) that proposed regulations be submitted to and lay before the respective congressional committees for 30 days before they are published in final form, at which point they then are subject to a formal legislative veto. However, this "report and wait" provision by its terms gives Congress no substantive authority, and it therefore adds nothing to the veto provision itself.

Under these circumstances, it is no more "evident" from the legislative history than it is from the text of Section 43 that Congress would have refused to pass the remainder of the employee protection plan without a legislative veto. Severance accordingly was compelled by this Court's precedents. *Chadha,* 462 U.S. at 931-932; *Buckley,* 424 U.S. at 108.[7]

2. Petitioners contend (Pet. 11-16), however, that the court of appeals utilized an incorrect test for determining whether the legislative veto provision is severable. Petitioners simply ignore the fact that the court of appeals quoted at length (see Pet. App. 15a-18a), and then faithfully applied (see *id.* at 19a-28a), the principles of severability followed by this Court in *Chadha* and *Regan* v. *Time, Inc.,* No. 82-729 (July 3, 1984), slip op. 11 (plurality opinion), which in turn were drawn from this Court's prior decisions in *Buckley* and *Champlin Refining Co.*[8] In particular, the court of appeals, like this Court in each of the decisions just cited, posed the central question to be whether " 'it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (Pet. App. 16a). Moreover, although petitioners contend (Pet. 16-20) that the decision below conflicts with decisions of other courts of appeals, the three court of appeals decisions relied upon by petitioners in

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[7]Petitioners also attempt to gain support (Pet. 14-15 n.7) from the lack of a severability clause covering Section 43. However, as the court of appeals noted (Pet. App. 16a-17a n.7), it is not at all clear that the pre-existing severability clause in the Federal Aviation Act, 49 U.S.C. App. 1301, is inapplicable to Section 43 or that Congress believed it to be inapplicable. In any event, the court of appeals properly recognized (Pet. App. 16a n.7) that the "ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson,* 390 U.S. 570, 585 n.27 (1968).

[8]Petitioners concede (Pet. 11-16) that the principles announced in these decisions are controlling here.

which the court actually resolved the question of the severability of a legislative veto provision all applied precisely this same test drawn from *Champlin Refining Co.* See *EEOC* v. *CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984) (cited at Pet. 17); *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984) (Pet. 18); *McCorkle* v. *United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (Pet. 18-19).[9] The remaining two court of appeals decisions cited by petitioners (Pet. 18, 19) addressed the severability of unconstitutional provisions of a *state* statute; they did not involve a legislative veto provision in a *federal* statute, as here. Nonetheless, one of the two decisions again explicitly followed *Champlin Refining Co.* (see *Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 855, 863 (1st Cir. 1980)), and the other did not suggest a different approach (see *Scheinberg* v. *Smith*, 659 F.2d 476, 481-482 (5th Cir. 1981)).

Petitioners apparently premise their argument that the court below applied an erroneous test of severability on the following statement in its opinion: " 'the question is not whether Congress would have enacted th[is] *exact* statute[] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all' " (Pet. App. 18a (emphasis and brackets in original), quoting *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 804 (T.E.C.A.), cert. denied, No. 84-20 (Oct. 1, 1984). Contrary to petitioners' contention (Pet. 8-10, 11-12, 16, 19-20), this observation manifests no departure from settled severability principles, and there was no suggestion by the court below or by the

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[9]In the fourth legislative veto decision cited by petitioners (Pet. 19), the court of appeals did not resolve the question of severability, although there likewise is nothing in its opinion to suggest a different approach to that question. See *Muller Optical Co.* v. *EEOC*, 743 F.2d 380, 387-388 (6th Cir. 1984).

TECA in *Gulf Oil Corp.* v. *Dyke, supra*, that any such departure was intended.[10] Rather, the observation simply gives expression to the two alternatives confronting a court that must rule on a question of severability: the court must either leave the statute in effect with the unconstitutional provision severed, or it must invalidate the statute in its entirety. In either event, the result is not exactly what Congress contemplated when it enacted the statute. Nor is the court free to refashion the law Congress did enact in an effort to replicate exactly what the Court believes Congress would have passed if it had known the legislative veto provision would be held unconstitutional.

Thus, the passage quoted above is but another way of stating the common sense question presented in any severability case: would the legislature have preferred the statute, after severance of the unconstitutional provision, to no statute at all? The court of appeals concluded in this case that Congress clearly would have preferred to retain Section 43 with the legislative veto provision severed. Petitioners have wholly failed to show that that conclusion was erroneous. Moreover, just last Term, this Court denied review in another case in which it was alleged that the observation in *Gulf Oil Corp.* v. *Dyke, supra*, that petitioners challenge constituted a departure from established severability law. See Pet. at 8, 16-17, Reply Br. at 7-9, *Energy Reserve Group, Inc.* v. *Department of Energy*, cert. denied, No. 84-188 (Dec. 4, 1984). There is no reason for a different result here.

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[10]The opinion in *Gulf Oil Corp.* v. *Dyke, supra*, expressly relies on the severability principles of *Buckley* and *Champlin Refining Co.* See 734 F.2d at 803-804.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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